United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: August 25, 1997

Case No. 96 INA 078

In the Matter of:

FORMOSA PLASTICS CORP., U.S.A.,
Employer

on behalf of

TSAO-HUANG CHEN,
Alien

Appearance: Alan Lee, Esq., of New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of TSAO-HUANG CHEN (Alien) by FORMOSA PLASTICS CORP., U.S.A., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability at that time and place.[2]

STATEMENT OF THE CASE

The Employer applied for labor certification on behalf of the Alien to fill the position of System Analyst. AF 46. The Employer is engages in the business of petrochemical processing and plastic manufacturing in Livingston, New Jersey. Employer offered a salary of $42,364.00 per year for this forty hour a week position. Employer required a Master's of Science Degree in "INF.SYS"[3] or Computer Science and eighteen months of experience in the job offered or eighteen months of experience as a program analyst or senior programmer. As its other special requirements, Employer listed "knowledge of IBM Systems, including AS400, OS400; knowledge of RPGIII language for programs, Synon, LCLP, and Query; skill to develop and manage systems MVS/XA; knowledge of materials, purchasing, environment and maintenance concepts for applications; and must be able to prepare mathematical model or sampling techniques to test system applications." AF 46.

Notice of Findings. On June 21, 1995, the Notice of Findings (NOF) issued by the Certifying Officer (CO) advised Employer that certification would be denied, subject to rebuttal, stating several issues. AF 98. First, the CO challenged the adequacy of the wage offered by Employer. Second, the CO questioned whether the position offered normally required both a Master's degree and the special requirements set forth above. In commenting on these requirements, the CO observed that the circumstance that the Employer uses certain hardware/software does not necessarily prove the business necessity of these skills, as systems analysts do not need industry specific experience in moving routinely from concentration on one application area to another. The CO said the Employer could rebut this finding by amending its special

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]It is inferred that this is an abbreviation for information systems.

requirements or demonstrating the business necessity for these requirements, and the CO then listed specific facts for the Employer to establish in proving the business necessity of its special requirements.

Finally, the CO observed that the Employer hired the Alien without a Master of Science degree and without experience in the special requirements listed above. The CO said the Employer must either submit evidence clearly showing that the Alien had the qualifications at the time of hire or it must demonstrate the reasons it is not now feasible to hire a U. S. worker with the comparable background under the same terms as it extended to the Alien. AF 98-103.

Rebuttal. On July 15, 1995, the Employer filed rebuttal evidence that included a list of its employees who have Master's degrees. It also included a statement by Employer contending that the IBM AS/OS 400 was the only computer system it used, and said it followed that knowledge of this system and compatible software was mandatory to the performance of the duties of this position. Employer also submitted rebuttal evidence on the issue of the prevailing wage. AF 104-173.

Final Determination. The CO's Final Determination (FD), issued August 3, 1995, denied certification. AF 179. The CO found that the evidence Employer submitted on rebuttal adequately addressed the prevailing wage issue. The CO was not persuaded, however, by Employer's evidence as to its requirement of an M.S. degree in Computer Sciences and the other special requirements stated above. The CO acknowledged that Employer's business used the computer software identified in the special requirements, but found that the use of this software is not compelling proof of its business necessity for purposes of the Act and regulations. Also, the CO said, the employer's list of employees who do have experience in this software did not prove that they had this experience before they were hired as a condition qualifying them for employment in this position. Similarly, the list of employees with Masters degrees did not prove that they had this educational qualification before they were hired. The CO also said that the documentation submitted did not address the Employer's requirement for material, purchasing, environment & maintenance concepts for applications.

Moreover, Employer did not establish that the Alien had earned his Master of Science degree before it hired him. The CO also found that the Employer did not demonstrate that the Alien had experience in the required software or met its requirement for material, purchasing, environment and maintenance applications experience before he worked for the Employer. As the Employer failed to prove the business necessity of a Master of Science degree and its other special requirements, and since the

Employer failed to demonstrate that the Alien had the required special experience before it hired him, the labor certification application was denied. AF 179.

Appeal. On September 5, 1995, the Employer requested review by BALCA. AF 438. At that time the Employer filed a statement that discussed the job requirements in much greater detail, describing the nature of Employer's business and the relationship between its job requirements and the position offered. Employer now represented that the Alien did have the Master's degree before it hired him, explaining that he completed the necessary courses in January of 1992 and that Employer hired him as a computer programmer in February, 1992, and the degree was awarded in May, 1992. The Employer said it did not promote the Alien to systems analyst until December 1, 1993, however. Employer then argued that the Alien had over eighteen months of computer programming experience, system design, hardware knowledge and IBM hardware/ software before he was hired by Formosa Plastics. Finally, Employer said that its requirement of a Master's degree meets the DOT norm as the SVP requirement of two to four years' experience is not specific as to when the requirement starts, while the Occupational Outlook Handbook indicates that master's degrees are preferred in some more complex computer jobs. In concluding its appeal, the Employer conceded that it had not clearly addressed all of the NOF issues in its rebuttal. AF 438.

DISCUSSION

It is relevant that the Employer's appeal acknowledged that it now is relying on evidence that was not submitted on rebuttal addressing issues raised in the NOF. The regulations explicitly provide, however, that the Board shall review the denial of labor certification on the basis of the Appellate File, which is the record on which the CO denied alien labor certification, in addition to the request for review and any statements of position or legal briefs of the appellant. Accordingly, such late filed evidence cannot be considered on appeal under the rule established in **Capriccio's Restaurant,** 90 INA 480(Jan.7, 1992), which holds that evidence first submitted with the request for review cannot be considered by the Board.

The CO stated in the NOF that the requirement of a Master of Science degree in computer science and the Employer's special requirements regarding hardware/software experience were not normally required for the job opportunity. The Employer merely asserted in its rebuttal that the hardware/software experience was required and Employer attached a list of its employees who had master's degrees. The CO said in the FD that the Employer's list failed to disclose whether all employees were required to have a Master's degree before they were hired and whether they actually had such educational experience before being hired.

Furthermore, Employer's rebuttal evidence failed to address the alien's lack of experience on the hardware/software before he was hired by the Employer as noted in the NOF. Employer's failure to produce relevant and reasonably obtainable information concerning its employees whom it required to have a Master's degree before it hired them, as requested by the CO in the NOF, is grounds for denial of certification. **STLO Corporation,** 90 INA 007(Sept. 9, 1991). In addition, 20 CFR § 656.25(e) further provides that Employer's evidence must rebut all of the findings in the NOF, and that any findings that are not rebutted shall be deemed admitted. In construing this regulation the Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. **Behla Corp.**, 88 INA 024 (May 5, 1989). It follows that the failure of the Employer's rebuttal to address the CO's finding that the Alien lacked the requisite experience with the designated hardware/software before Employer hired him is deemed admitted. Since the regulations clearly require an employer to demonstrate that it did not hire the alien with less training or experience for a job similar to the position offered, and since the Employer in this case did not sustain its burden of proving that fact, labor certification was properly denied.

Summary. We find Employer has not documented the requirement for a Master of Science degree and the other special requirements that the CO found were neither normal for this position nor a business necessity. We further find the Employer failed to prove that the Alien had the required qualifications of experience in the designated hardware/software before he was hired for the job at issue. Accordingly, we conclude that the CO's denial of alien labor certification was proper in that the Employer failed to prove that its special requirements were normal to the position, the Employer did not demonstrate that those requirements arose from its business necessity, and Employer did not establish that the Alien met those special requirements before the Employer hired him.

Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No. 96 INA 078

FORMOSA PLASTICS CORP., U.S.A., Employer
TSAO-HUANG CHEN, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: August 14, 1997